

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

SHAUNA CULBERTSON

Claimant

V.

DENNYS

Respondent

AND

NATIONAL SURETY CORP.

Insurance Carrier

Docket No. 1,073,403

ORDER

STATEMENT OF THE CASE

Claimant requested review of the November 16, 2015, preliminary hearing Order entered by Administrative Law Judge (ALJ) Steven M. Roth. Roger D. Fincher of Topeka, Kansas, appeared for claimant. Ryan S. VanFleet of Kansas City, Missouri, appeared for respondent and its insurance carrier (respondent).

The ALJ found claimant failed to sustain her burden of proving timely notice of an accident was provided to respondent.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the November 12, 2015, Preliminary Hearing, and the transcript of the September 10, 2015, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Claimant argues respondent had actual knowledge of her left shoulder injury; therefore, timely notice was provided pursuant to K.S.A. 2013 Supp. 44-520.

Respondent maintains the ALJ's Order should be affirmed. Respondent argues claimant did not provide timely notice of an injury to her left shoulder, and respondent did not have actual knowledge of any injury within the prescribed time frame. In a discussion with the ALJ at the beginning of the September 10, 2015, Preliminary Hearing, respondent argued the shoulder injury arises out of a traumatic injury in March 2015 for which respondent did not have notice.

The issues for the Board's review are:

1. What is the date of accident or injury by repetitive trauma?
2. Did respondent have timely notice and/or actual knowledge of claimant's injury?

FINDINGS OF FACT

Claimant worked for respondent as a server. Claimant initially sustained an injury to her right wrist on April 30, 2014, which resulted in a docketed workers compensation claim. Claimant later developed left shoulder pain, which she believed to be from compensating for her right wrist injury. Claimant initiated a new claim by filing an Application for Hearing (E-1) on April 3, 2015, alleging a series of repetitive traumas to the left shoulder through July 31, 2014. The E-1 filed on April 3, 2015, resulted in the docketed claim giving rise to this appeal. Claimant filed an amended E-1 on April 7, 2015, in the same claim related to the E-1 filed on April 3, 2015, alleging a series of repetitive traumas to the left shoulder through March 25, 2015, as a result of compensating for the right upper extremity.

Claimant testified she sought treatment, on her own, with her chiropractor for her left shoulder complaints in June or July 2014. On July 29, 2014, claimant's chiropractor, Dr. Gary Counselman, recorded left shoulder pain for the prior two weeks and burning left upper extremity pain from the neck to the forearm. Dr. Counselman wrote that he discussed claimant's work activities with her and which work activities she should stop doing. Claimant saw Dr. Counselman again on July 31, 2014, with the same complaints.

Claimant returned to Dr. Counselman on March 31, 2015. Dr. Counselman recorded left scapular pain and left upper extremity pain from the neck to the forearm, present since a lifting injury on March 10, 2015. Claimant testified she lifted a bus tub and felt a pull in her left arm in March 2015. She clarified her statement by saying she "literally felt something pull."¹ Claimant testified her left shoulder symptoms worsened after the tub lifting injury. Claimant told a co-worker about the incident, but did not tell a supervisor about the tub lifting injury.

Claimant was examined by Dr. Lynn Ketchum on March 12, 2015, for her right wrist injury. Dr. Ketchum noted claimant was still working and had developed scapulothoracic syndrome with pain on the inferior medial aspect of her left scapula. Dr. Ketchum wrote, "[U]ntil she has her MRI and has the left scapulothoracic issue resolved, I've taken her off work."² Dr. Ketchum examined claimant again on March 25, 2015. As a result of his

¹ P.H. Trans. (Sept. 10, 2015) at 15.

² *Id.*, Cl. Ex. 5 at 1.

examination, Dr. Ketchum wrote that claimant should be off work due to pain in both her upper extremities. Dr. Ketchum did not mention the tub lifting injury in his March 12, 2015, report.

Claimant was examined by Dr. Divelbliss on May 20, 2015. In the history of present illness portion of his examination report, Dr. Divelbliss wrote, "About 2 months ago, while working at Denny's, she was carrying a tub of dirty dishes, when she felt something 'pull' along the medial border of her left scapula."³ Dr. Divelbliss diagnosed left shoulder girdle pain and opined, "I believe that her left shoulder girdle and left upper extremity pain represents a new acute injury rather than a specific compensating overuse type situation."⁴

Claimant indicated she did not complete an accident report with respondent for her left shoulder injury. She stated her manager, Matthew Miller, was aware of her left shoulder condition when he reprimanded both her and a co-worker. Claimant explained:

A. Well, I had another server rubbing my left shoulder and a customer made a complaint about it because it was, they felt, indecent. So Matt had a conversation with me about that.

Q. Okay. Did you tell Matt at that time when this complaint came up that you were having left shoulder problems?

A. Yes. He knew that. He had already known that. Christine [Whitebread] as well.⁵

Mr. Miller denied claimant's testimony, stating he was not aware of any claim or accident related to her left shoulder. Mr. Miller noted claimant had previously reported a separate accident to him, but she did not report a left shoulder injury. Mr. Miller did not ask claimant any questions related to physical symptoms because he "didn't observe her with any ailment."⁶ Mr. Miller explained he felt the shoulder rub was lewd behavior and was not unusual because in his opinion, claimant and her co-worker "historically acted sexually inappropriately at work."⁷ Mr. Miller did not write up claimant for her behavior.

Charles Hill, claimant's co-worker, testified he rubbed her shoulder when she was in pain. Mr. Hill testified claimant occasionally wore her arm in a sling, and it was obvious

³ P.H. Trans. (Sept. 10, 2015), Cl. Ex. 4 at 4.

⁴ *Id.* at 5.

⁵ P.H. Trans. (Sept. 10, 2015) at 24-25.

⁶ P.H. Trans. (Nov. 12, 2015) at 33.

⁷ *Id.* at 26.

“there was aggravation.”⁸ Mr. Hill could not recall which shoulder he rubbed for claimant or which arm wore the sling. He agreed they were reprimanded by Mr. Miller after a customer complained about the shoulder rub. Michelle Barsch, a server at respondent, testified shoulder rubs between employees were not unusual. Christine Whitebread, respondent’s general manager, agreed with Ms. Barsch’s testimony.

Ms. Barsch stated there were many times claimant complained of pain in her shoulder to Ms. Whitebread; however, she could not name a specific incident where claimant reported an injury. Ms. Barsch testified:

Q. Okay. Did you ever hear [claimant] report to Christine Whitebread that she had hurt her shoulder at work or that her shoulder was just hurting?

A. I don’t know. I don’t know if I’m assuming – I don’t know.

. . .

Q. Okay. Is it possible that you never overheard her report a shoulder injury to Ms. Whitebread?

A. I suppose it’s possible, but I don’t know.⁹

Ms. Whitebread stated she never had a conversation with claimant regarding a left shoulder injury. She was present for a conversation between claimant and respondent’s district manager Hassib Darweesh, which occurred sometime during the first week of April 2015. Ms. Whitebread explained Mr. Darweesh wanted to clarify claimant’s work restrictions to see what modified work could be performed.¹⁰ She testified:

Q. Okay. At some point [during the conversation] did the topic of a left shoulder injury come up?

A. Yes.

Q. Okay. And what was said?

A. When [Mr. Darweesh] asked why she couldn’t do something with her left hand, she said because her left shoulder was hurting.

Q. Okay.

⁸ *Id.* at 10.

⁹ *Id.* at 60-61.

¹⁰ Claimant was placed on restrictions by Dr. Ketchum in March 2015.

A. And [Mr. Darweesh] asked her what happened.

Q. Okay.

A. And the short of it was she said that it did not happen here.

Q. Okay. Did she give an indication of whether it was a new injury or an old injury or did she say?

A. To my – to my recollection it was something that had happened a while back.¹¹

Mr. Darweesh concurred with Ms. Whitebread's testimony, stating he was never informed claimant sustained a left shoulder injury at work, or otherwise, until the conversation regarding her restrictions. Further, Mr. Darweesh said claimant informed him her left shoulder was hurt "a long time ago" and was not work-related.¹² Mr. Darweesh was direct in his testimony:

Q. Okay. And again, you're clear with your memory that during that meeting [claimant] said that [her left shoulder injury] was not a work injury?

A. Absolutely, positively clear.¹³

Mr. Darweesh testified claimant made it apparent to him during the conversation that she no longer wanted to work. He notified human resources to take her off work. Claimant was also taken off work by Dr. Ketchum on March 25, 2015, effective until her upper extremity issues resolved.¹⁴ Mr. Darweesh stated he never saw the March 25, 2015, note from Dr. Ketchum until he testified on September 10, 2015, and was unaware when it may have been received by his office. Ms. Whitebread recalled the note from Dr. Ketchum and believed it was what prompted the conversation between claimant and Mr. Darweesh. Ms. Whitebread stated she forwarded the restriction notes to the corporate office once she received them.

Claimant testified her last day at respondent was sometime in late March 2015. Mr. Darweesh testified claimant's last day was the date of their conversation, during the first week of April 2015. Claimant has not worked since leaving respondent.

¹¹ P.H. Trans. (Sept. 10, 2015) at 45.

¹² *Id.* at 64.

¹³ *Id.* at 64-65.

¹⁴ See *id.*, Cl. Ex. 6 at 3.

PRINCIPLES OF LAW

K.S.A. 2014 Supp. 44-520 states:

(a)(1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:

(A) 20 calendar days from the date of accident or the date of injury by repetitive trauma;

(B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or

(C) if the employee no longer works for the employer against whom benefits are being sought, 10 calendar days after the employee's last day of actual work for the employer.

Notice may be given orally or in writing.

(2) Where notice is provided orally, if the employer has designated an individual or department to whom notice must be given and such designation has been communicated in writing to the employee, notice to any other individual or department shall be insufficient under this section. If the employer has not designated an individual or department to whom notice must be given, notice must be provided to a supervisor or manager.

(3) Where notice is provided in writing, notice must be sent to a supervisor or manager at the employee's principal location of employment. The burden shall be on the employee to prove that such notice was actually received by the employer.

(4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.

(b) The notice required by subsection (a) shall be waived if the employee proves that: (1) The employer or the employer's duly authorized agent had actual knowledge of the injury; (2) the employer or the employer's duly authorized agent was unavailable to receive such notice within the applicable period as provided in paragraph (1) of subsection (a); or (3) the employee was physically unable to give such notice.

(c) For the purposes of calculating the notice period proscribed in subsection (a), weekends shall be included.

K.S.A. 2014 Supp. 44-508(e) states, in part:

In the case of injury by repetitive trauma, the date of injury shall be the earliest of:

(1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;

(2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;

(3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related; or

(4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹⁵ Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2014 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.¹⁶

ANALYSIS

The ALJ found claimant failed to provide timely notice of the injury by repetitive trauma. The undersigned agrees.

1. What is the date of accident or injury by repetitive trauma?

In order to determine whether notice was timely, the date of accident or injury by repetitive trauma must be determined. In the first E-1 filed by claimant, she alleged a series of repetitive trauma to the left shoulder through July 31, 2014. In the second E-1, claimant alleged a series of repetitive trauma to the left shoulder, related to overuse due to immobility of the right wrist, through March 25, 2015. Claimant testified to a new injury in March 2015 related to lifting a tub full of dishes. Dr. Counselman notes in his March 31, 2015, clinical note that the tub lifting incident occurred on March 10, 2015. Dr. Divelbliss refers to a new injury in March 2015 related to lifting a tub.

¹⁵ K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, rev. denied 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, rev. denied 271 Kan. 1035 (2001).

¹⁶ K.S.A. 2014 Supp. 44-555c(j).

The undersigned finds the date of accident is March 10, 2015. Claimant testified she injured her shoulder lifting a bus tub in March 2015.¹⁷ She described feeling a pull in her shoulder and worsening shoulder symptoms after the injury. The first reference to left scapular pain in the medical records is found in Dr. Ketchum's March 12, 2015, report, two days after the March 10, 2015, injury. Dr. Counselman examined claimant on March 31, 2015, for complaints of, inter alia, pain in the left scapular area, writing, "The symptoms have been present since the date of onset on March 10, 2015."¹⁸ There was no note of left scapular pain in Dr. Counselman's clinical notes from 2014. Dr. Divelbliss noted claimant felt something "pull" along the medial border of her left scapula in March 2015.

2. Did respondent have timely notice and/or actual knowledge of claimant's injury?

There is no evidence in the record claimant told anyone other than a co-worker about the March 10, 2015, injury. Claimant asks the Board to find respondent had actual knowledge of her shoulder injury. Claimant testified Mr. Miller was aware of her left shoulder condition but failed to explain how or when Mr. Miller became aware. However, she qualified her statement by saying she "believed" she told him.¹⁹ Mr. Miller denied being told of a specific injury to claimant's shoulder related to her work with respondent.

Mr. Darweesh denies receiving notice of or having knowledge of a work-related shoulder injury from claimant. He knew she was having trouble with her right hand. When he asked about claimant's left hand, she told him she hurt her left shoulder somewhere other than work. Ms. Whitebread confirmed Mr. Darweesh's testimony, stating claimant told Mr. Darweesh she could not lift with her left hand because of her left shoulder. Ms. Whitebread stated claimant told him it did not happen at work.

The undersigned finds respondent did not have actual knowledge of left shoulder injury. Respondent's first notice of a work-related shoulder injury by repetitive trauma occurred when claimant filed her first E-1 on April 3, 2015, more than 20 calendar days from the date of injury by repetitive trauma. Respondent, however, never received notice of the March 10, 2015, tub lifting injury, which gave rise to claimant's need for medical treatment.

CONCLUSION

Claimant failed to meet the burden of proving she provided timely notice of an injury by repetitive trauma within 20 days as required by K.S.A. 2014 Supp. 44-520.

¹⁷ P.H. Trans. (Sept. 10, 2015), at 15.

¹⁸ *Id.*, Cl. Ex. 7 at 7.

¹⁹ P.H. Trans. (Sept. 10, 2015) at 7.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Steven M. Roth dated November 16, 2015, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of January, 2016.

HONORABLE SETH G. VALERIUS
BOARD MEMBER

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Hon. Steven M. Roth, Administrative Law Judge